



Legal complaints in Scotland:

# Consumers at risk of vulnerability

slcc  
consumer  
panel

## The SLCC Consumer Panel

The SLCC Consumer Panel was established under the Legal Profession and Legal Aid (Scotland) Act 2007 to assist the SLCC in understanding and taking account of the interests of consumers of legal services.

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### Thanks to:

The Legal Services Consumer Panel (England and Wales) for their assistance. The Panel's excellent publication *Recognising and Responding to Consumer Vulnerability – A Guide for Legal Services Regulators* was a very useful starting point.

All who participated in our roundtable event on vulnerable legal consumers in Scotland on 23 May 2018.

The SLCC for providing secretariat support to the Panel and, in particular, David Buchanan-Cook for drafting the main text of this document for publication.

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# Foreword

The SLCC Consumer Panel is an independent advisory panel, set up to assist the SLCC in:

**Making recommendations on how the SLCC can improve policies and processes;**

**Suggesting topics for research connected to legal consumers; and**

**Expressing a view on matters relating to the SLCC's functions, such as responding to consultations.**

One of the areas of the SLCC's activities which has interested the Consumer Panel is how effectively organisations respond to consumers who are at risk of vulnerability. Our interest and concern arise from our knowledge of complaints about legal services in Scotland, and the feedback received from consumers of the complaint system. We are also aware that vulnerability is an important and complex concept which is under ongoing review by a wide range of regulators. We thought it would be valuable to the legal profession to draw on recent literature and to gather views on this topic in Scotland.

This short publication draws together strands of opinion from academics, regulators, service providers/law firms, the British Standards Institution, consumers, SLCC staff and consumer experts. At the end, we pose a range of questions for regulators, service providers/law firms and for the SLCC and other complaint handling bodies.

The Panel hopes that the publication will stimulate organisations to consider how they can provide more effective services for consumers who are at greater risk of vulnerability in relation to legal services in Scotland. This may involve training for staff, raising awareness of complaint handling systems, ensuring ease of access to and use of those systems, providing effective information and communication systems and clear and transparent websites.

Building on the roundtable event we hosted in 2018, we would like this publication to be viewed as the start of a conversation with stakeholders about consumers at risk of vulnerability when making complaints about legal services. We welcome your views and suggestions on the publication.

**Carol Brennan, Chair of the SLCC Consumer Panel**



**...vulnerability is an important and complex concept which is under ongoing review by a wide range of regulators**



# Introduction

This document builds on the Consumer Principles guidance we published in 2017.

In that document we looked at the eight consumer principles:

**access**

**choice**

**quality**

**safety**

**information**

**fairness**

**representation**

**redress**



## **We felt that more work needed to be done on the subject of vulnerability**



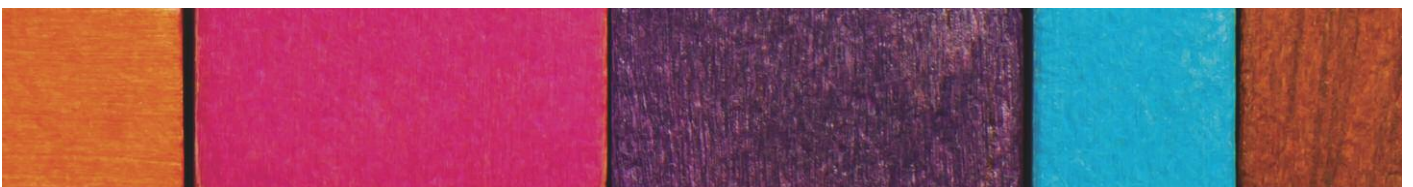
We asked questions about how those who provide legal services – and the organisations which regulate those providers – should apply these principles to legal services in Scotland.

As we worked our way through those principles, the Panel became increasingly aware of how important these principles were for consumers at risk of vulnerability in particular. We felt that more work needed to be done on the subject of vulnerability. This is particularly relevant because when lawyers engage with members of the public this will generally be a stage in their lives at which they are vulnerable.

We had also noticed, when we looked at information which the SLCC had analysed for us, that a significant percentage (21%) of consumers bringing complaints to the SLCC said that they had a disability. While the terms disability and vulnerability are not interchangeable, the Panel felt that there were close links.

In the summer of 2018 we held a roundtable event to explore what “vulnerable” meant to those who use, and those who give, legal services. We invited a cross-section of interested parties – from consumer-interest groups, law firms, legal consumers and regulators.

This publication is a result of that discussion and we are extremely grateful to everyone who took part. We hope that this booklet will be helpful to all those involved in providing legal services in Scotland to better understand, and more effectively meet, the needs of vulnerable legal consumers.





# 1 What is vulnerability?

Most regulators and providers of dispute resolution services recognise that it is important to identify and meet the needs of consumers who may be at risk of vulnerability.

As a starting point then it is worth looking at what we mean by the term “vulnerability”.

Historically, the tendency has been to focus on the personal characteristics and circumstances of particular identifiable groups of consumers. The consensus around this approach was that these should include potential vulnerability characteristics such as (1) age (2) low income (3) those who do not work (4) long term disabled (5) those with lower educational attainment (6) rural dwellers and (7) ethnic minorities.

In common with other sectors, within the legal sector, clients’ vulnerable characteristics will also include, levels of literacy, geographical location, lack of digital skills and/or internet access, sensory or cognitive impairment, language barriers and mental health. This is discussed further below in the section on the British Standard on Inclusive Service Provision.

We define vulnerability as when a consumer’s personal circumstances and characteristics combine with aspects of the market to create situations where they are:

- Significantly less able than a typical consumer to protect or represent his or her interests in the market
- Significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial.

Ofgem



**there is a spectrum of vulnerability – from transient or transitory at one extreme, to persistent at the other**



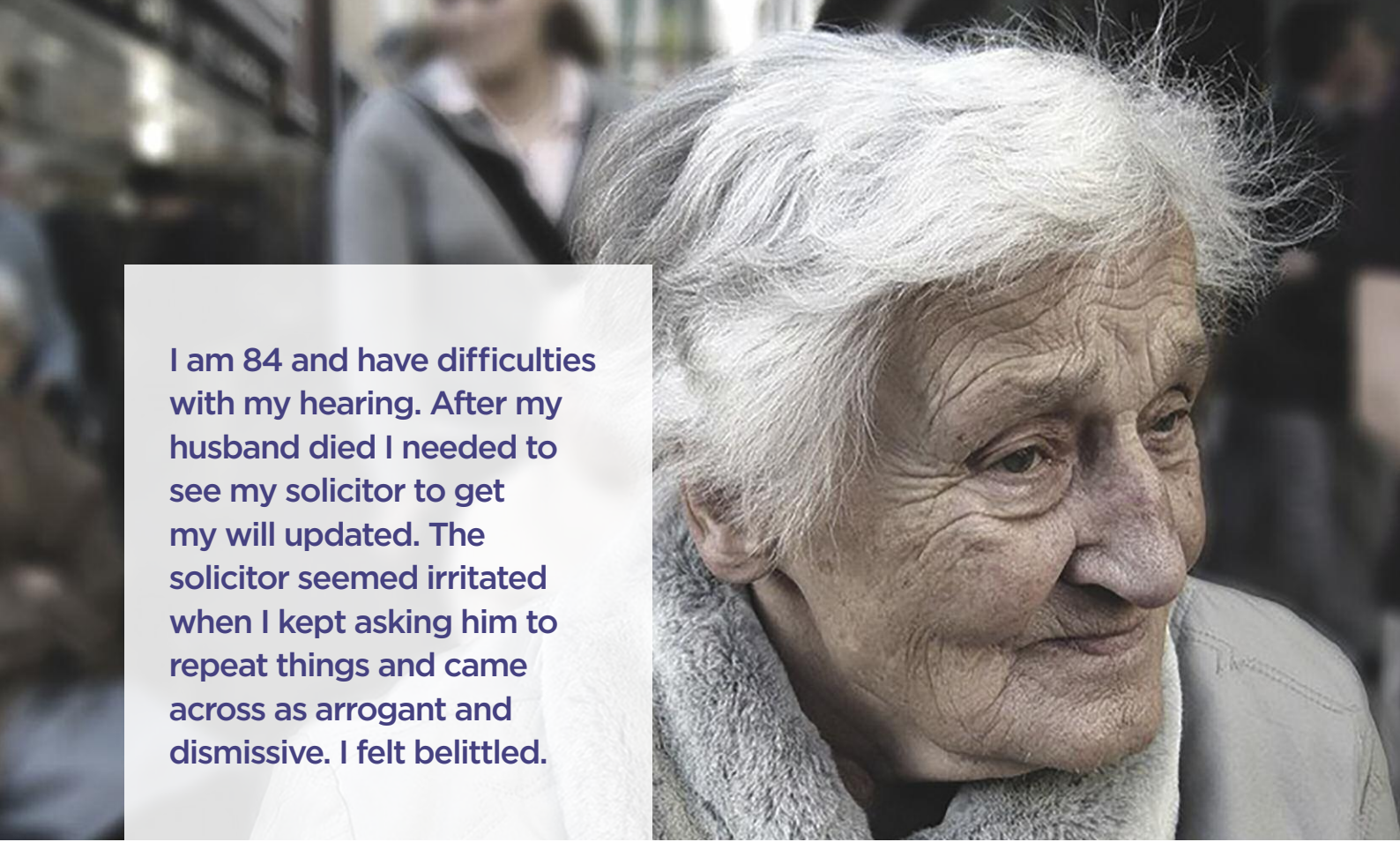
The Consumer Panel's interest is potential vulnerability in legal services in Scotland, in particular complaints where those legal services are inadequate to meet the needs of consumers at risk of vulnerability.

From that perspective, additional market behaviours from the legal sector which may impact on vulnerability might include factors such as the cost of legal services, accessibility of information on those costs, perceived or actual barriers to accessing legal services, and an inherent asymmetry of information.

However, there are wider considerations which may stem from the particular circumstances underlying the very need to access legal services. These may be related to factors such as employment status, single parenthood, mental illness, homelessness, alcoholism/addiction, loss of liberty, issues around domestic abuse or child abuse. This is discussed at length below in the section on identifying vulnerability.

Further, while some vulnerability characteristics may be long term or permanent – such as chronic illness or disability – others may be shorter term or temporary, arising from significant events such as divorce, bereavement or sudden illness. What this means is that there is a spectrum of vulnerability – from transient or transitory at one extreme, to persistent at the other.

Most recent research on vulnerability tends to take the wider view that most individuals are, to varying degrees, vulnerable. It is also generally considered to be a fluid state in that we are all, or could all be, vulnerable at different stages of our lives, and in different situations. With that in mind, this surely must pose real difficulties for solicitors in identifying which clients are vulnerable. It's not simply the elderly or infirm, or those who lack capacity and require a Power of Attorney. Where a great deal of transactions will be distress purchases – stemming for example from relationship breakdowns, bereavements, immigration and asylum work, even the trauma of a house move – to what extent should these clients also be considered to be vulnerable? Fear, anxiety, depression or even simply uncertainty must surely be considered characteristics of vulnerability.



**I am 84 and have difficulties with my hearing. After my husband died I needed to see my solicitor to get my will updated. The solicitor seemed irritated when I kept asking him to repeat things and came across as arrogant and dismissive. I felt belittled.**

Vulnerability may frequently cause, or coincide with, legal problems. Where vulnerability characteristics are at the transient end of the spectrum, and/or less visible, they may be less easy for service providers to identify. It is also the case that different characteristics will overlap or will change over time. That can pose a significant challenge for those providing legal services.

It is regrettable when the providers of legal services do not respond appropriately to vulnerability, or even do not identify it at all. This can be doubly challenging where, as is often the case, the consumer may not actively self-identify as being vulnerable.

A man with mental health problems consulted his solicitors regarding a medical negligence claim after an operation. The firm established that the man had no grounds to make a successful claim as most of the issues were as a result of his mental health problems rather than the operation. However, they delayed telling him this.

In investigating the complaint and reviewing the firm's file, I found that, despite being aware that this was a particularly vulnerable client, the firm failed to do any work on his case for a period of around a year. This made him more vulnerable as it extended the period of his uncertainty.

I believe that had the firm been acting for an individual who was more assertive, and in a less vulnerable position, they would have been more likely to have progressed his case.

Case Investigator, SLCC



How legal businesses respond can be a key factor in preventing things from going wrong. Taking appropriate measures can, ultimately, avoid complaints about services which have not been effectively tailored to the needs of the individual client.

**Often taking little extra steps to address the particular needs of the client could have avoided a complaint reaching the SLCC.**

Case Investigator, SLCC

**In practice, consumers at all income levels are exposed to the risk of detriment. Often characteristics overlap, can vary widely and change quickly (for example physical needs and low income).**

Legal Services Consumer Panel



## 2 Identifying vulnerability risk factors

The British Standards Institution (BSI) proposes that organisations should identify ‘risk factors’ which can make consumers more susceptible to detriment, and encourages them pro-actively to take action to address these.

The BSI identifies ten common risk factors. These include age, disability or other impairment, mental health issues, low income, sudden change in circumstances and the complexity of the product.

The BSI’s approach is illustrative of the more complex and multi-dimensional definitions of consumer vulnerability. It highlights the changeability of the status of the consumer, on the basis of their own changing needs in combination with the particular situation with which they are faced.

The British Standard on Inclusive Service Provision defines vulnerability as:

The condition in which a consumer is at greater risk of mis-selling, exploitation, or being put at a disadvantage in terms of accessing or using a service, or in seeking redress.

*The British Standard on Inclusive Service Provision (BSI 2010)*

As noted here, while some vulnerability risk factors will be generic across all sectors, others will be specifically related to individual industries or types of service.

A complainer I dealt with has trouble speaking English, particularly when speaking on the ‘phone. This can work to her detriment as she is unable to communicate nuances in the same way as a native speaker. As a result, there is a danger that some of her complaint could be misunderstood or “lost”.

While as an impartial body we deal with facts and evidence and do not “take sides”, I feel that people with language problems will always be at a disadvantage when faced with a firm which will always be able to voice its position eloquently.

Case Investigator, SLCC

The Legal Services Consumer Panel for England and Wales has developed the BSI’s risk factors further to include those which are specific to legal services. The following table reflects their expanded list:

|                                     |                            |                                |                               |                            |
|-------------------------------------|----------------------------|--------------------------------|-------------------------------|----------------------------|
| <b>Inexperience</b>                 | <b>Learning disability</b> | <b>Low income</b>              | <b>Low literacy</b>           | <b>Cultural barriers</b>   |
| <b>English as a second language</b> | <b>Location</b>            | <b>Mental health issues</b>    | <b>Health problems</b>        | <b>Being a carer</b>       |
| <b>Age</b>                          | <b>Physical disability</b> | <b>Lack of internet access</b> | <b>Living alone</b>           | <b>Lone parent</b>         |
| <b>Loss of income</b>               | <b>Leaving care</b>        | <b>Bereavement</b>             | <b>Relationship breakdown</b> | <b>Release from prison</b> |

### 3 Identifying degrees of vulnerability

It is important to recognise in discussing legal services that there are varying degrees or levels of vulnerability and that vulnerability does not derive solely from the consumer's "personal characteristics", nor from their capacity to engage with a legal professional.

#### Different levels of vulnerability



##### **Red**

##### **Particularly vulnerable**

Greatly heightened risk of detriment

##### **Amber**

##### **Vulnerable**

More likely to experience harm, loss or disadvantage

##### **Green**

##### **Potentially vulnerable**

Possible future change



## The very fact that a client needs legal advice puts them in a position of vulnerability



The Law Society of Scotland's guidance for solicitors equates vulnerability with "capacity" and suggests that this can be easily identified by the legal practitioner<sup>1</sup>. However, the Panel believes that vulnerability is far more complicated than that, and much less obvious to identify.

The very fact that a client needs legal advice puts them in a position of vulnerability but how widely that is identified, acknowledged and addressed by solicitors is an area of concern. The SLCC sees evidence in legal complaints that these factors are sometimes overlooked.

The nature and circumstance of the legal action, and a lack of familiarity with the law and legal processes, can make a client more vulnerable and may create a risk that may not be immediately clear to the legal practitioner. Here we are considering, for example, civil cases involving domestic abuse, stalking, child contact, forced marriage and honour-based violence, immigration and asylum status, protective orders against family members, neighbours, housing, bereavement, unemployment – the list is endless. Some of these can effectively be paralysing for the client.

Client confidentiality is critically important in many of these circumstances since careless and inappropriate disclosure of information, even an address, could not only seriously prejudice the client's case but might also endanger the client and place them in a position of heightened vulnerability.

<sup>1</sup> Guidance B1.5: Vulnerable Clients Guidance.



Legal professionals must be aware that, depending on the circumstances, disclosing information about the other party to the legal professional's own client, may endanger that other party. This is a particularly sensitive issue where there is a history of domestic violence or abuse, for example.

Mrs. Z had experienced a history of domestic abuse at the hands of her ex-husband. When she had concerns about the actions of her ex-husband's solicitors, she followed the SLCC's process and reported the matter directly to the firm first. The firm forwarded her letter to their own client and, in so doing, inadvertently disclosed Mrs. Z's contact details.

Mr. & Mrs. X consulted their solicitors in relation to adopting a child. The birth parents of the child were both in prison and a social work report showed that they had been asking about the location of their child. One of the parents was due for release. Mr. & Mrs. X were very worried as they lived in a remote location which was close to the birth parents' home town. Despite assurances of anonymity, the firm listed their clients' address on the adoption certificate thus exposing them to fear of potential harm.

Vulnerability can also have a cumulative impact, in that one type of vulnerability can lead to others. For example, consumers with low basic skills are less likely to be employed, and clients seeking refugee status may be more likely to have language and interpretation problems. The difficult personal circumstances which underly a client's reason for engaging a legal practitioner can often lead to heightened stress levels, less time for dealing with personal administrative tasks (such as answering important correspondence), general pre-occupation and lack of perspective.

**Vulnerability is as diverse as the people it affects – and understanding and appreciating this diversity and complexity is key to understanding the impact it has on people's lives.**

*Financial Conduct Authority*



## 4 The power imbalance

A critical factor to consider when discussing vulnerability in legal services is the imbalance of power between the professional and the consumer, a disadvantage that may not be immediately apparent to the professional.

Legal professionals hold a considerable degree of power over their clients, whether or not they recognise that this dynamic exists. Clients will naturally defer to someone whom they regard as having, and expect to have, professional expertise.

This power dynamic means that it is all too simple for professionals to appear to dictate to clients, be dismissive about clients' very real concerns or simply fail to understand them. This can mean that they fail to realise that what they take to be compliance or a lack of engagement may be uncertainty, confusion, fear, anxiety, or even depression. In these situations, the client is less likely to realise that the relationship is one of "dialogue" and that they can ask questions, for example, "what am I entitled to?" The client's lack of confidence and agency means that may not bring matters to the attention of the professional, due to a mis-conception that these would be seen as irrelevant or even "too difficult" to deal with by the professional.

Clients may also not understand the technicalities of what is being explained. This can be amplified by confusing introductory letters and complex overly-legal Terms of Engagement. This can often be because they are in such a distressed state of mind due to the trauma of the matter that brings them to seek legal assistance. However, they may be reluctant to express this lack of understanding. All of this can be exacerbated by the way that legal professionals correspond, take instructions, and explain options and the progress of the case. At its extreme, this can effectively exclude client participation or questioning around decisions.

“there can seem little or no awareness that something life-changing is shaking the client’s very foundations”

The majority of complaints received by the Scottish Legal Complaints Commission relate to communication issues. Some of those stem from the fact that communication has not taken into account the client’s distressed situation – there can seem little or no awareness that something life-changing is shaking the client’s very foundations. Others use language and technical jargon that assumes that the client has a level of knowledge and understanding that is unrealistic.

**I have never learned to read. When I went to see my solicitor he gave me leaflets to read to explain things and then contacted me in writing. I was too embarrassed to admit that I had difficulty reading and never really understood what was going on, or why.**

Consumers who are vulnerable in this way are less likely to challenge or question the actions of a legal professional. This means that, if they experience a poor level of service, they are less likely to make a complaint during the course of the action or work. This also means that the practitioner is less likely to have the opportunity to take prompt remedial action and retain the client solicitor relationship.

Furthermore, they may have had difficulty sourcing a legal practitioner to represent them in the first place, particularly if, for example, they have been seeking a practitioner who offers legal-aid funded services. They will not want to appear to be a “problem client” for fear that this may prejudice the service they receive, or be anxious that the legal professional will stop acting further for them. If the latter happens, it may be difficult to find an alternative appropriate representative at short notice, or even at all, depending upon the supply of legal representatives in the area.

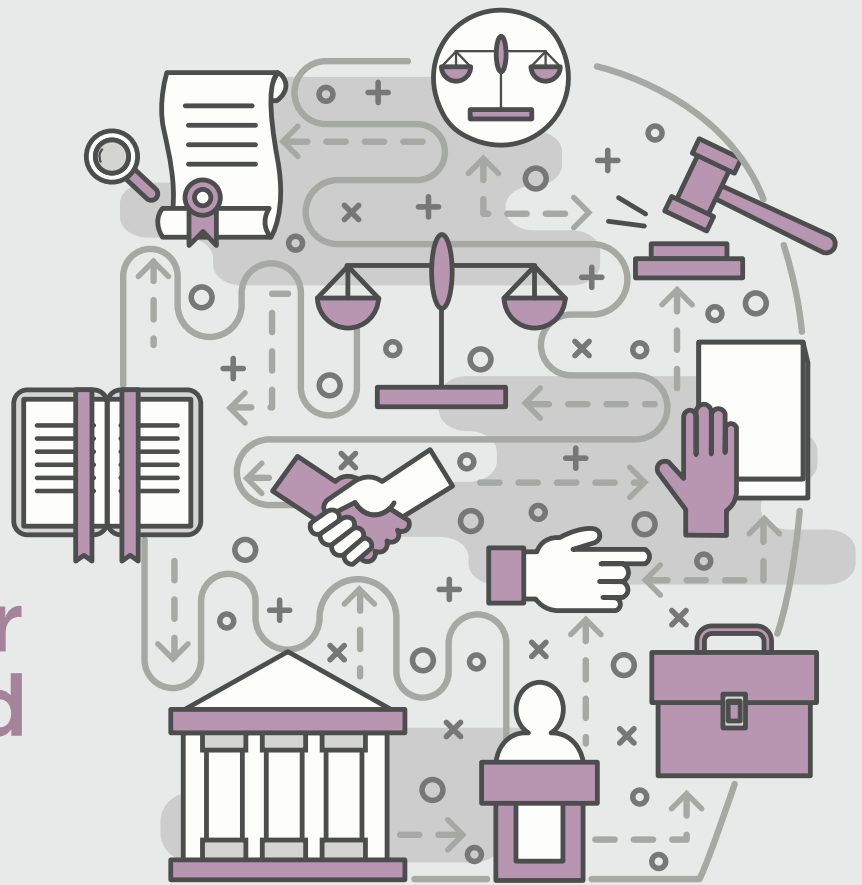
**In my town everyone knows everybody else’s business and there are only a couple of firms to go to. I was reluctant to complain about the poor service I received – it felt awkward complaining about someone I have known for a long time.**

Recognition of this power imbalance – whether it is a real imbalance or perceived as such by the vulnerable client – is key when assessing how accessible services are to vulnerable clients.

**The fear of impacting the service by complaining, or being seen as a trouble maker, is something I hear every day from complainers on the ‘phone. It becomes a vicious circle.**

Administrative Assistant, SLCC

## 5 The service standards for solicitors and vulnerability



The Law Society of Scotland has set four high level service standards which apply to solicitors as individuals and also as partners in firms.

**Competence**

**Diligence**

**Communication**

**Respect**

These standards apply to several relationships – dealing with other solicitors, with advocates, with other professional organisations, as well as, of course, with consumers.

But how do they apply to consumers at risk of vulnerability?

From the perspective of the solicitor-consumer relationship, with particular reference to dealing with vulnerable clients, the Panel's first inclination was to question the order in which these are set out. The Law Society's position is that these all carry equal weight and are in no order of priority – however, we would suggest that such prioritisation is implicit.

In terms of prioritisation, the Panel considered that the starting point should be respect. This is the basis on which all relationships surrounding the provision of legal services should be built.

Our second ranked standard is communication. As we have already explored, how the practitioner communicates with their client is key to removing the barriers which can present to vulnerable clients. We also know that, in terms of complaints about legal services, the vast majority stem from poor or inadequate communication.

In our view, diligence appears more consumer-focussed than competence – it should be a given that the practitioner has the technical ability to carry out the work: delivering on promises and tailoring services to the needs of individual clients is more critical, particularly where vulnerability is an issue.

The Panel therefore suggests the following reverse ordering:

## **Respect**

Recognising diversity; understanding the context; addressing the needs of the individual client.

## **Communication**

Use of plain English; focussing on what the consumer needs to know; clear but comprehensive letters of engagement; adapting communication to meet consumer needs; listening; transparent and clear complaints handling.

## **Diligence**

Delivering on commitments; offering alternatives that meet the needs of different consumers; acting in the best interests of the client; fairness and transparency on fees.

## **Competence**

Being honest and upfront about ability to serve the customer; taking responsibility for performance of themselves and others.

Whilst arguing that respect should be the foundation stone for the service standards, the Panel considers that this is probably the most subjective of the standards. It is a difficult issue for a consumer to substantiate in terms of poor service – the most extreme examples of respect issues are likely to be considered as conduct matters rather than inadequate service to the consumer.

However, the question remains to be answered by regulators, do these service standards adequately meet the needs of vulnerable clients? Should different, or additional, standards be considered?



## 6 Summary and conclusions

In the previous sections we have looked at various aspects of vulnerability within the context of the provision of legal services. The key conclusions we have reached are that:

- Vulnerability is not solely based on individual traits, or “personal characteristics”, but can be multi-dimensional;
- Vulnerability is not always a static position but can be dynamic and transient;
- Vulnerability is about the situation in which people find themselves, and the problem they need addressed, rather than simply or solely about who the person is; and
- All of us have the potential to be vulnerable when placed in a situation where we feel we have little control, or where there is a real or perceived power imbalance.

Finally, we looked at the existing service standards for solicitors in Scotland and questioned the priority of these and, indeed, whether these are the right standards to meet the needs of vulnerable legal service users in today’s Scotland.

In the sections which follow we pose these and other questions as checklists for those involved in the provision and regulation of legal services in Scotland. Based on the discussions held, we hope consideration of these will shift a corrective focus on how legal services are provided, particularly in relation to consumers at risk of vulnerability using the widest and most inclusive interpretation of the term.

The debate regarding the definition of vulnerability is ongoing. In the context of complaint handling, as a Panel we embrace a view of consumer vulnerability which highlights both its persistent nature for certain classes of consumer, and also its multidimensional and potentially transitory nature.

# Questions for Regulators

Regulators have a key role to play within the sector to ensure that the provision of the sector's services are accessible to all. This includes recognising, identifying and adapting to the needs of those consumers who are at risk of vulnerability. Listening to the consumer voice is critical to meeting that need.

- Do you actively engage with vulnerable legal service users?
- What research have you carried out in relation to vulnerable clients?
- Do the professional service standards which you set adequately address the needs of vulnerable clients?
- Are those service standards in the correct order of priority?
- Are there additional or alternative standards which might better apply?
- Do you agree that vulnerability is wider than issues relating to capacity?
- Is the available guidance for your members wide enough in its definition of what constitutes vulnerability?
- What training is available to your members in recognising, and adapting to the needs of, vulnerable clients?
- How do you regularly confirm the understanding of vulnerable clients and that you are acting to their instructions? How do you ensure that they have brought important matters to your attention and feel engaged?
- What guidance, best practice notes or other support is available for members?
- How often is that training content reviewed and updated?
- To what extent is vulnerability included within risk management assessments?
- Do you work collaboratively with the advice and charity sector?

# Questions for service providers/law firms

A vulnerable consumer is someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care. “Personal circumstances” is a wide definition and includes not only personal characteristics of individual consumers but the nature of the problem and the particular life events of the consumer

Much consumer protection legislation is underpinned by the notion of the average or typical consumer, and what they might expect, understand or how they might behave. Consumers in vulnerable circumstances, however, may be significantly less able to represent their own interests, and more likely to suffer harm than the average consumer. This is an area where firms can take action and create good outcomes for the customer.

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- Is equality and diversity awareness embedded in your firm’s culture?
- Are your firm’s services tailored, or tailorable, to the needs of vulnerable clients?
- How do your staff at all levels within your business recognise vulnerable characteristics?
- What training do you provide to your staff to help them deal with vulnerable clients?
- Are communications, including terms of business/letters of engagement, adapted, or adaptable, to the needs of vulnerable clients?
- Do you offer a range of communication methods for your clients?
- Is your firm’s complaints process accessible to vulnerable service users – both in terms of how it is physically accessed and in the language you use?
- Have barriers which may prevent vulnerable clients from making complaints been recognised, and have corrective measures been taken?
- How do you ensure that feedback from vulnerable clients is fed back into improving the services you provide?

Mr. F has a mental illness and meets the criteria in terms of the Equality Act 2010. During the first meeting with the solicitor we advised her of Mr. F’s disability and gave an account of what this meant for him and how it affects him. Mr. F explained his problems with administration and organisation. At no point did the solicitor ask what adjustments she would need to make, nor did she ask any questions as to how his disability would affect their working relationship. She also failed to ask the court for adjustments. No risk assessment was carried out and although this itself may not constitute a failure to make a reasonable adjustment, it’s likely to lead to a failure.

# Questions for SLCC & other complaint-handling bodies

To ensure a consistent approach that is embedded across all operations, it is important to have a high-level policy on consumer vulnerability in place.

Research demonstrates that it is important for staff on the front line to have sufficient training to facilitate a proper conversation and that they know where external expertise lies, and know how and when to refer on.

Financial Conduct Authority

- Are front line staff suitably trained to spot the triggers of potential vulnerability, including those wider “life circumstances”?
- Is assistance available to help vulnerable complainers – eg. in completing complaint forms and/or framing complaints?
- Are staff adequately trained to signpost to support agencies at every opportunity?
- Are complainers encouraged to disclose vulnerable characteristics?
- Where they do, are staff sufficiently aware and empowered to adapt accordingly?
- Is the complaints process adequately flexible to be accessible to and protective of vulnerable complainers?
- Is the process easy to follow?
- Are policies and published guidance adaptable to the needs of vulnerable complainers?
- Does the way prematurity is dealt with help or hinder consumers at risk of vulnerability?
- Do they need to be redesigned?
- Is the SLCC’s website tailored for vulnerable service users?
- Are complainers offered a range of communication methods suited to their needs?
- Are face to face meetings with complainers encouraged?
- To what extent are communications in Plain English?

The use of legalese in the communications was impenetrable and off-putting and made me feel that the system was weighted for those with a legal background.

SLCC Complainer

A face to face meeting with your Investigator might have made things a lot easier for me.

SLCC Complainer



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